IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.46 OF 2000
IN
L.C. SUIT NO. 1743 OF 1992

1. Zahid Ahmedali Mazgaonwalla,

2. Smt.Shahin Zahid Mazgaonwalla,
Both of Bombay, Indian
Inhabitant
residing at Haron Manzil,
2nd Floor, Room No.1,2,3 and
4,85 Shaida Marg, Dongri,
Bombay - 400 009. ..**Appellants.**

VERSUS

Smt. Gulshan Pyarali Mazgaonwalla
of Bombay, Indian Inhabitant,
residing at Haroon Manzil,
2nd Floor, Room No.1,2,3 and 4, 85,
Shaida Marg, Dongri,
Bombay - 400 009. ..**Respondent.**

Mr.P.S. Dani for the Appellants.

Mr.S.J.Irani for the Respondent.

CORAM : DR.S.RADHAKRISHNAN,J.

DATE : 11TH JULY, 2006.

ORAL JUDGMENT :-

1. The Respondent is the paternal aunt of Appellant No.1. Appellant No.2 is the wife of Appellant No.1. The suit premises was tenanted by the Appellant No.1’s grand father Pyarali Mazgaonwalla since deceased in the year 1957. At the time of his death, the Respondent and eight other siblings

including Appellant No.1's father Ahmedali along with their mother lived in the suit premises. Admittedly, the rent receipts were issued in the name of the Respondent's father Pyarali until his death and continued to be issued in his name until December, 1974. Since 1st January, 1975, the rent receipts have been admittedly issued in the name of Respondent's mother - Jenabai on the basis of a Will left by Pyarali. Jenabai, during her lifetime, got the rent receipts transferred in favour of the Respondent in 1981, as claimed by the Respondent. The Respondent, thereafter filed a suit, bearing Suit No.1743 of 1992 before the Bombay City Civil Court for a declaration that she was solely entitled to the suit premises consisting of four rooms on the IInd floor of building known as "Haroon Manzil" and that the Appellants have no right, title or interest in the suit premises, and for a mandatory injunction to remove them. The Trial Court, by its judgment and order dated 25th October 1999, declared that the only person entitled to the suit premises was the Respondent. It also declared that the Appellants had no right, title or interest in or over the suit premises. Accordingly, the Appellants have been restrained from entering into suit premises and from parting with the possession to anybody else. This present Appeal arises from the

said impugned judgment and order dated 25th October, 1999. In the present Appeal, a preliminary objection as to the jurisdiction of the Bombay City Civil Court to hear the suit as the matter arose out of Bombay Rent Act was raised and that only the Court of Small Causes had jurisdiction to entertain the same. The said objection was overruled by my Learned brother Mr.Rohee, J. by order dated 5th May, 2006, accordingly the present Appeal was directed to be heard on merits.

2. It was argued by the Learned Counsel for the Appellants, Mr.Dani that the Appellants are the joint tenants with the Respondent and others, and that the Respondent is not the exclusive tenant of the suit premises. Mr.Dani also argued that no exclusive transfer of tenancy to Jenabai was possible since under Muslim Law, consent of the family members is required while making more than 1/3 proportion by a bequest, and no such consent was obtained. At the time of death of Pyarali, Appellant No.1’s father Ahmedali was residing with him as a family member as such Ahmedali was a joint tenant with other family members. At the time of death of Ahmedali, Appellant No.1 was residing as a family member.

3. Mr.Dani, the Learned Counsel for the Appellant, strongly contended that under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (hereinafter : the Bombay Rent Act), no bequest of tenancy is possible in the light of the Bombay High Court Division Bench judgment of **Anant T. Sabnis Vs. Vasant Pratap Pandit**, reported in **(1979) Mh.L.J.755,** which was upheld in Appeal befor**e the** Supreme Court in **Vasant Pratap Pandit Vs. Dr.Anant Trimbak Sabnis, (1994) Mh.L.J. 1450.** Mr.Dani argued that under section 5(11)(c)(i) of the Bombay Rent Act, by virtue of the fact that Appellant's father Ahmedali had been residing in the suit premises at the time of Pyarali's death, he became a joint tenant along with others. Mr.Dani, the Learned Counsel also argued that Jenabai, not being the sole tenant, could not have transferred tenancy to Gulshan, her daughter, during her lifetime. Mr.Dani, the Learned Counsel for the Appellants submitted that merely the rent receipt in the name of Respondent will not deprive the Appellant No.1's joint tenancy right. In that behalf, Mr.Dani relied on **Ramesh S.Kale Vs. Madhav B. Wadnere, (2001) Supp. Bom.C.R. 321** and **H.C. Pandey Vs. G.C. Paul, AIR 1989 SC 1470**

4. Mr.Irani, the Learned Counsel for the

Respondents placed heavy reliance on the wordings of the Will of Pyarali dated 8th April, 1957. On the basis of words,"I further direct that....my son

Ahmedali be asked to reside separately and to maintain himself from his own earnings." It was contended that in view of the said wordings, Ahmedali could not be construed as a 'member of the family', which is a prerequisite of Section 5(11)(c)(i) of the Bombay Rent Act. Therefore, Mr.Irani contended that the Appellant No.1 cannot be protected under the above mentioned section.

5. In refutation of non-availability of the right of bequest of tenancy, in the light of **Anant Sabnis Vs. Vasant Pandit (Supra)**, Mr.Irani contended that the court determined the said position only in the year 1979 whereas tenancy rights had been bequeathed in 1957 itself. Mr.Irani, the Learned Counsel therefore, contended that the said interpretation of law should not apply retrospectively. Hence, Mr.Irani pointed out that the transfer would be legal and valid. Mr.Irani then pointed out that no objection was raised at the time of transfer of rent receipt by legal heirs hence, it amounted to tacit consent of transfer of rent receipt in the name of the Respondent.

6. Mr.Irani relied on **Abdul Kadar Vs. Pathumma, ((1994) DMC 502** of a learned Single Judge of Kerala High Court, to contend that consent for bequeathment beyond 1/3rd could be express or implied. Mr.Irani,

the Learned Counsel contended that the consent was implied in this case. Mr.Irani also relied on a Learned Single Judge's judgment in **Shaikh Abdul Reheman Mohammad Ashraf Vs. Shaikh Mohamad Haji Papamiya, 2005 Bom.R.C. 462**, with regard to joint tenancy. Mr.Irani also relied on an English judgment in **Trayfoot Vs. Lock (1957)1 All E.R.423,** in this behalf.

7. In the light of the arguments put forth by both the parties, two principal questions arise for consideration before me :

1. Whether tenancy rights can be bequeathed ?

2. Can an heir of the deceased tenant claim exclusive tenancy rights especially in the light of Section 5(11)(c) of the Bombay Rent Act ?

8. In answer to the first question, the law is well settled as a result of our High Court's Division Bench judgment in **Anant T. Sabnis Vs. Vasant Pratap Patil (Supra)** later upheld by the Supreme Court. The same has been explained in paragraph 11 of the judgment which is quoted as under :-

> "11 :- Prohibition against transfer of tenancy rights by the tenants is just a corollary to the restrictions on landlords and is aimed at protecting them, in turn. By preventing the tenants from abusing these protections, by thrusting uncontemplated strangers as tenants on the landlords, will nilly, for monetary gain or favouring any friend or relative of theirs, and thus ensuring that the immunity against eviction is not expanded into licence to dispose of premises as if it were their own and land lords rights are not invaded beyond what is strictly necessary. Contemplated protection is intended for the benefit of the tenants inducted by the landlords voluntarily and the members of his family residing with them and not for their unauthorised assigns, transferees or his favourites or strangers. Even all his lawful heirs are not included within the sweep of this protection. Prohibition appears to have aimed at the very disposing power of the tenant over his tenancy rights and includes every voluntary transfer, contractual or otherwise. That the legislature legalised certain unlawful subleases, or made even licensees as tenants in an anxiety to eradicate the identical evils, is besides the point."

In paragraph 13 it further goes on to say,

> "13 :- It is not without significance that legatee is not included in the definition of the word 'tenant'. Section 5(11) of the Act defines it to mean 'a person who is liable to pay the rent or on whose account the rent is payable for any premises. Under sub-clauses (a) to (c) it is enlarged to include some

> others whom Legislature considered it necessary to protect. Clause (c) provides for the succession to the tenancy rights on the death of the tenant. Thus, this sub-clause(c) by providing for the mode of succession, impliedly excludes successors from the purview of the width of the main clause. Secondly, it restricts the succession even by operation of law of inheritance to the persons and situations indicated therein and impliedly excluding all other heirs. In fact, all the heirs are liable to be excluded if any other member of the family was staying with the tenant at the time of his death. Thirdly and more importantly, legatee is not included
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> either in this sub-clause or any other sub-clauses. This demonstrates legislative intent to prohibit testamentary disposition of the tenancy rights. There is no other express provision to this effect in the Rent Act. It shall have to be traced only in section 15 thereof by interpreting the words ‘assign’ and ‘transfer’ in their generic sense. This also fortifies our interpretation of these words."

9. In the same case on Appeal (**Vasant Pratap Pandit Vs. Anant Trimbak Sabnis 1994 Mh.L.J. 1450**), the Hon’ble Supreme Court while explaining the import of Section 5(11)(c) has stated the following in paragraph 14 on page 1457 :-

> "14 :- The words "as may be decided in default of agreement by the Court" as appearing in section 5(11)(c)(i) are not without significance. These words in our view have been incorporated to meet a situation where there are more than one heirs. In such an eventuality the landlord may or may not agree to one or the other of them being recognised as a ‘tenant’. In case of such disagreement the Court has to decide who is to be treated as ‘tenant’. Therefore, if ‘heir’ is to include a legatee of the will then the above-quoted words cannot be applied in case of a tenant who leaves behind more than one legatee for in that

> case the wishes of the testator can get supplanted, on the landlord's unwillingness to respect the same, by the ultimate decision of the Court. In other words, in case of a testamentary disposition, where the wish or will of the deceased has got to be respected a decision by the Court will not arise and that would necessarily mean that the words quoted above will be rendered nugatory. What we want to emphasise is it is not the heirship but the nature of claim that is determinative. In our considered view the legislature could not have intended to confer such a right on the testamentary heir. Otherwise, the right of the landlord to recover possession will stand excluded even though the original party (the tenant) with whom the landlord had contracted
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> is dead. Besides, a statutory tenancy is personal to the tenant. In certain contingencies as contemplated in section 5(11)(c)(i) certain heirs are unable to succeed to such a tenancy. To this extent, a departure is made from the general law."

10. This ratio raises the logical question as to whether bequest of tenancy by a will, deed or gift, will deprive another of a statutory right under section 5(11)(c)? This question has been succinctly answered in the case of **Ramesh S. Kale Vs. Madhav B. Wadnere, (2001) Supp. Bom.C.R.321** by this very Court.

> "Merely because the person in whose name, receipts are issued happened to be one of the legal heirs of the original tenant, the right of the other heirs are not wiped off. In fact, the law in this regard is well established as already stated above, i.e. upon the death if the original tenant, tenancy rights are inherited by all the legal heirs. At the cost of repetition it can be stated that the Trial Court has found that the Petitioner was residing with the original tenant and he is one of the legal representatives of the original tenant."

11. In the instant case as well, it is an admitted fact that Zahid (the Appellant) was residing in the suit premises as a family member and hence he cannot be deprived of his statutory right, as a joint tenant.

12. Coming to the next question, in my opinion section 5(11)(c) was envisaged by the legislature to protect the rights of joint tenants. The Supreme Court in the case of **H.C. Pandey Vs. G.C.Paul AIR 1989 SC 1470** held :-

> ".....it is now well settled that on the death of the original tenant, subject to any provision of the contrary, either negativing or limiting succession, the tenancy rights devolve on the heirs of the deceased tenant, held that it is a single tenancy which devolves on the heirs. There is no division of the premises or of the rent payable thereafter and that is the position as between the landlord and the heirs of the deceased tenant. In other words, the heirs succeed the tenancy as joint tenants."

13. The requirements to be fulfilled for co-habitants to claim joint tenancy rights under section 5(11)(c)(i) have been laid down in the oft quoted case of **Ahsok Chintaman Juker Vs. Kishore Pandurang Mantri, (AIR 2001 SC 2251, at 2253)**. Paragraph 10 of judgment reads as under :

> "10 :- There are two requisites which must be fulfilled before a person is entitled to be called ‘tenant’ under sub clause (c); first he must be a member of the tenant’s family and

> secondly, he must have been residing with the tenant at the time of his death. Besides fulfilling these conditions he must be agreed upon to be a tenant by the members of tenant's family; in default of such agreement the decision of the Court shall be binding on such members."

14. The judgment in **Abdul Kadar Vs. Pathumma (Supra)** cited by Mr.Irani, will be of no assistance to Mr.Irani, as this Court as well as Hon'ble Supreme Court have clearly held that the tenancy rights cannot be bequeathed. The wordings in the Will of Pyarali,

cannot be construed to mean that Ahmedali was not to be treated as a family members, since he continued to stay as a family member throughout with Pyarali, during his lifetime, even after the said Will and at the time of death of Pyarali, and continued to stay as a family member till his death. At the time of death of Ahmedali, the Appellant No.1 was residing with him. Appellant No.1 has been residing at the said premises as a family member till date.

15. The facts and circumstances in **Shaikh Abdul Wrexham Mohammad Ashraf Vs. Shaikh Mohamad Haji Papamiya (Supra)**, will not apply in the instant case, as Petitioner No.2 was never recognised as a tenant in that case.

16. Similarly, the English case cited by Mr.Irani

in **Trayfort Vs. Lock (Supra)** will have no application in the light of specific legal provision by way of section 5(11)(c) of Bombay Rent Act, and as interpreted by our Court and upheld by the Hon'ble Supreme Court.

17. The last contention of Mr.Irani that the judgment of this Court in **Anant T.Sabnis Vs. Vasant Pratap Pandit,** delivered in 1979 cannot have retrospective application has no substance, as a judgment only lays down what the law always has been, as such there is no question of retrospective or prospective application. Only in case of any amendment to an enacted law, one can argue whether it has retrospective effect or not, but not in case of any judgment.

18. Under the aforesaid facts and circumstances, both the questions raised in paragraph - 7 are answered in the negative in favour of the Appellants.

19. Accordingly, the Appeal is allowed. The Trial Court's judgment and decree dated 25th October, 1999 stands set aside and the suit No.1743 of 1992 filed before the City Civil Court, Bombay stands dismissed.

20. Appeal stands disposed of accordingly, however with no order as to costs.

(DR.S.RADHAKRISHNAN,J.)